No. 89-641

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD GARNETT, *et al.*

v.

RENTON SCHOOL DISTRICT NO. 403, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, under the Free Speech and Free Exercise Clauses of the First Amendment, or the Equal Access Act, 20 U.S.C. §§ 4071-4074, public school officials may prohibit a voluntary, student-initiated, and student-led group of high school students from meeting in empty classrooms before or after school to engage in religious speech, when other student groups are allowed to meet for nonreligious purposes not directly related to the school curriculum.

2. Whether the Establishment Clause of the First Amendment requires public school officials to prohibit a voluntary, student-initiated, and student-led group of high school students from meeting in empty classrooms before or after school to engage in religious speech, when other student groups are allowed to meet for nonreligious purposes not directly related to the school curriculum.

PARTIES TO THE PROCEEDING

The parties include Petitioners Richard Garnett by and through his next friend Peggy Smith, Scott Germino, Robert Ryan by and through his next friend Jack Ryan, and Richard Tracy by and through his next friend Michael Tracy; and Respondents Renton School District No. 403, Robert L. Anderson, John G. Dubois, Marcia K. Holland and Margarita Prentice, in their official capacities as members of the school district board of directors, and Brian Barker and Gary Kohlwes, school district employees, in their official capacities.

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RENTON SCHOOL DISTRICT NO. 403, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Richard Garnett, *et al.*, petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion (as twice amended) of the court of appeals (Pet. App. A) is reported at 874 F.2d 608. The opinion of the district court (Pet. App. D) is reported at 675 F. Supp. 1268.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1989, and amended on March 3, 1989, and again on May 15, 1989. The Court's order denying rehearing and suggestion of rehearing *en banc* (Pet. App. B) was entered on July 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

In addition to the First Amendment to the United States Constitution, this case involves the Equal Access Act, 20 U.S.C. §§ 4071-4074, which is set forth in full in Appendix E.

STATEMENT OF THE CASE

A. The Facts

Lindbergh High School ("LHS") is a 1,100-student public high school serving grades 9 through 12 within the Renton School District ("the school district"), which receives federal financial assistance and is located in Renton, Washington, a suburb of Seattle.

LHS provides opportunities for students to organize clubs to meet on school premises for discussion of topics of common interest. Stipulation to Facts ("Stip.") at 2, ¶¶ 5-6 (Exc. 3); Dep. of H. Kloes, pp. 18-19 (Exc. 212-13).[1]

The school district describes these student groups as "co-curricular," "not offered for credit toward graduation" but "providing a broad offering of purposeful learning experiences, some of which are more appropriately conducted outside of the approved curriculum of the District." School District Policy No. 6470 (Exc. 128). According to this written policy of the school district, these activities "shall ordinarily be conducted wholly or partly outside the regular school day and shall be available to students who voluntarily elect to participate."[2]

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[1] Citations to the Excerpt of Record submitted to the court of appeals will be denoted as "Exc." Citations to the Clerk's Record in the trial court are designated "CR."

[2] Student groups permitted to use school facilities within the District pursuant to this policy in the past have included a photo club, rocket club, chess club, arts and crafts clubs, Key (Kiwanis

Id. Participation in these clubs is not a prerequisite for graduation, nor does it confer credit towards graduation. In general, student members, not faculty members, plan club activities and no faculty instruction takes place. Deps. of H. Kloes, p. 41 (Exc. 219); J. Peterson, p. 4 (Exc. 221); D. Allen, p. 227 (Exc. 227). No faculty member tests or grades participation or performance in such club meetings. Deps. of G. Kohlwes, p. 19 (Exc. 208); H. Kloes, p. 41 (Exc. 219; CR 95). Twelve of fifteen clubs at LHS are not class-related in that club participation is not required as part of any class. Dep. of B. Barker (I), pp. 27-29, 42-44 (Exc. 186-88, 194-96). Nor is serving as a club advisor a part of the pedagogical function or job description of any faculty member. Deps. of J. Peterson, p. 4; D. Allen, p. 4; N. Greiner, p. 8 (Exc. 221, 225, 227, 230). Many of the faculty advisors for these clubs receive no stipend for monitoring the club meetings. Exhibit X to Dep. of B. Barker (Exc. 135; CR 95). The school district expressly stipulated that student clubs at LHS meet on school premises "during noninstructional time" and that "[o]ne or more of said student clubs are student-initiated, significantly student-directed, and student participation therein is voluntary." Stip. at 2, ¶¶ 5, 6 (Exc. 3).

Beginning in November 1984, petitioner Scott Germino, then a sophomore at LHS, met with principal Barker on several occasions to request permission to use school facilities during noninstructional time for meetings of a group of students to discuss religious and moral

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youth service) Club, SKY (Special Kiwanis Youth service) Club, ski club, golf club, and numerous other groups reflecting student interest. Renton School District Master Lists of Clubs, 1984-87 (Exc. 98-102). The "Master List" of approved student groups at the time petitioners commenced this litigation (the 1987-88 school year) included, *inter alia*, a chess club, a pep club, a bowling club, a ski club, a service club, a girls club, a varsity (lettermen's) club, a minority student club, an international club, and a dance club. Master List of Clubs, 1986-87 (Exc. 88-92).

issues, read the Bible, and pray. Barker denied these requests. Stip. at 2, ¶ 8 (Exc. 8); Affidavit of S. Germino, ¶ 3-5 (Exc. 39-40); Dep. of B. Barker (I), pp. 45-46 (Exc. 197-98). Since November 1984, the school district has repeatedly denied the students' request for permission to meet. *Id.* It is stipulated that the petitioner students' meetings would be entirely voluntary, student-initiated and student-directed, Stip. at 3, ¶ 11 (Exc. 4), and would not materially interfere with the orderly conduct of educational activities within LHS. Stip. at 3, ¶ 13 (Exc. 4). The students have never sought school endorsement or sponsorship of their discussions, nor have they asked the school district to assign a school employee to plan, lead, participate in, or even attend any of their voluntary meetings. Stip. at 3, ¶ 12 (Exc. 4); Dep. of B. Barker (I), pp. 45-46 (Exc. 197-98). The school district denied the students permission to meet because of the religious content of the students' intended speech and because of the school district's assertion that the students' meetings would not be curriculum-related, and would violate state and federal law. Stip. at 3, ¶ 10 (Exc. 4); Dep. of G. Kohlwes, pp. 25-26 (Exc. 210-11).

On September 18, 1987, the students and their parents brought suit in the United States District Court for the Western District of Washington under 42 U.S.C. § 1983 against the school district, its administrators and its board members (in their official capacities). Plaintiffs sought an injunction to enforce their constitutional rights to freedom of speech, free exercise of religion, freedom of association, and equal protection of the laws, as well as their statutory rights to "equal access" to a "limited open forum" under the Equal Access Act, 20 U.S.C. §§ 4071-4074.

B. The Decision of the District Court

In response to the Court's scheduling order, the parties agreed to the submission of deposition and affidavit testimony in lieu of trial testimony. The hearing on plain-

tiffs' motion for preliminary injunction was consolidated with trial on the merits.

On December 23, 1987, the district court dismissed the students' statutory claim for relief under the Equal Access Act, holding that the Act's mandatory open forum provisions were inapposite because of the school district's assertion that none of the clubs presently included on the Master List were "noncurriculum related" within the meaning of the Act. The Court cited "[t]he key point" to be "that none of the challenged clubs [meeting at LHS] is demonstrated to be student initiated and student directed and without sponsorship and substantial direction by the school through a faculty advisor or a teacher of a related course." Pet. App. 26a.[3]

As an alternative holding, the district court held that "[t]he EAA does not require the Renton School District to permit an unconstitutional use of school property" and under Washington law "meetings of religious groups on school premises would be unconstitutional. . . ." Pet. App. 34a, 35a. The court did not refer to this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), or *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), relying instead on the Second Circuit's pre-*Widmar* decision in *Brandon v. Board of Education of Guilderland Central Schools*, 635 F.2d 571 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), holding that "a high school is not a public forum like a park where religious views can be freely aired."

Relying on *Brandon*, the district court rejected the students' free exercise and equal protection arguments on the basis that there was no "showing of a coercive effect

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[3] However, the parties have stipulated that "[o]ne or more of said student clubs are student-initiated, significantly student-directed, and student participation therein is voluntary." Stip. at 2, ¶ 6 (Exc. 3).

upon a particular religious ritual," because "[p]laintiffs' religious group is nondenominational" and because "all religious groups are treated the same." Pet. App. 36a, 37a.

C. The Decision of the Court of Appeals

Richard Garnett and the other LHS students appealed the district court's order denying their motion for preliminary injunction and entering judgment for the Renton High School District on the merits. By opinion filed January 17, 1989, the Ninth Circuit affirmed the judgment of the district court. The Ninth Circuit amended its opinion on March 3, 1989 and again on May 15, 1989.

The Ninth Circuit applied the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to determine whether allowing the students' meeting on school grounds was consistent with the Establishment Clause. The Ninth Circuit held that arguably such an action might have a secular purpose, but that it would violate both the second and third prongs of the *Lemon* test. Pet. App. 8a.

The court of appeals expressly refused to follow this Court's analysis in *Widmar v. Vincent*, 454 U.S. 263 (1981), distinguishing it on the grounds that high school students were "less mature and more impressionable" than university students, and that student activities at LHS, unlike those in *Widmar*, were district-approved and supervised. Pet. App. 10a, 11a.

Addressing the students' First Amendment claims, the Ninth Circuit, relying on *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988), held that the students' free speech rights were not violated because the high school was not a First Amendment "limited public forum." The Court noted that "[d]istrict policy 6470 explicitly states that '[t]he Renton School District does not offer a limited open forum.'" Pet. App. 12a. Thus,

the Ninth Circuit said the district was free to exclude any club which it did not classify as an extension of its courses and programs. *Id.*

Finally, the Ninth Circuit held that the Equal Access Act did not apply because LHS did not have a "limited open forum" as defined by the Act. For the purposes of the Act, a high school has a limited open forum when "it grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). The court of appeals accepted the school district's self-referential definition of a "noncurriculum related group," Pet. App. 14a, which gives school officials unlimited discretion to determine when the Act applies. The court reviewed the record and concluded: [L]indbergh and the school district have considered instructional goals, and, in accordance with a written policy, made the clubs [all except the petitioner's club] a part of Lindbergh's curriculum." Pet. App. 16a.

The students' motion for a rehearing and suggestion for rehearing *en banc* were denied on July 18, 1989.

REASONS FOR GRANTING THE WRIT

The petitioners have been prohibited by school officials from meeting for voluntary discussions in empty classrooms before or after school. Respondent school officials have stipulated that the petitioners' meetings would not disrupt the school environment or the school's educational mission. Stip. at 3, ¶ 13 (Exc. 4). They also have stipulated that other student clubs are permitted to meet on school premises "during non-instructional time" and that "[o]ne or more of said student clubs are student-initiated, significantly student-directed, and student participation therein is voluntary." Stip. at 2, ¶¶ 5, 6 (Exc. 3). Respondents further admit that petitioners' meetings "are voluntary, student-initiated and student directed." Stip. at 3, ¶ 11 (Exc. 4). The school officials' sole basis

for refusing permission to petitioners is the religious content of the students' speech.

Under basic principles of the First Amendment, a content-based prohibition on speech activities is unconstitutional. *Widmar v. Vincent*, 454 U.S. 263 (1981); *see also Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). In *Widmar*, this Court held that a public university that makes facilities available to other student groups may not discriminate against religious student groups on the basis of the content of their speech, and rejected arguments that allowing a religious student group to meet would either endorse or entangle government with religion in violation of the Establishment Clause. The same principles ought to control in this case.[4]

Moreover, it is not necessary for this Court to address the constitutional rights of the students, for Congress has provided a statutory remedy designed for precisely this situation. After hearing reports of content-based restrictions on student religious speech in many school districts around the country, and following extensive

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[4] The court of appeals' reliance on *Hazelwood School District v. Kuhlmeier*, 108 S. Ct. 562 (1988) (Pet. App. B at 5185) is misplaced. *Hazelwood* involved a school-initiated, school-funded, faculty-directed high school newspaper, conducted as part of a course for which credit was given. 108 S. Ct. at 565. It has no application to student-initiated, student-directed speech that is unrelated to coursework or the official activities of the school. *See Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). The court of appeals' reliance on *McCollum v. Board of Education*, 333 U.S. 203 (1948) (Pet. App. 9a), is also misplaced. In *McCollum*, this Court held that a policy of allowing religious instructors to provide religious education to public school students on campus during the school day violated the Establishment Clause because it created the impression that the government was sponsoring religious education. *McCollum* did not hold, as the court of appeals imagined, that genuinely voluntary, student-initiated, and student-led activity before the commencement of the school day also violates the Establishment Clause.

hearings and reflective consideration of the constitutional issues involved, Congress overwhelmingly passed the Equal Access Act, 20 U.S.C. §§ 4071-4074. The Act prohibits public schools that receive federal financial assistance from denying students the opportunity to meet during noninstructional time on account of the "religious, philosophical, or political content of their speech," whenever the school has allowed "one or more" other student-initiated and student-run groups to meet for purposes that are "not directly related to the curriculum." 20 U.S.C. §§ 4071(a), (b), (c)(1), (c)(5) and 4072(3).

Under any objective definition of the key statutory term, "noncurriculum-related," the Equal Access Act applies to this case and respondent's content-based exclusion of petitioners' meeting is unlawful. But instead of enforcing the Act, the courts below effectively nullified the Act by accepting as "curriculum-related" essentially any activity the school officials declare to be so, even when it has only the most tenuous relation to coursework. According to the court of appeals, school officials have discretion in determining "what is and what is not curriculum related" (Pet. App. 14a, 15a). The officials' standard of curriculum-relatedness, approved by the courts below, is as follows:

> The public high school curriculum, for that matter the curriculum of a school district, is the educational program which consists of all of those programs, whether they be academic or nonacademic, which give effect to the mission of the school district as decided by the local board of directors.
>
> * * * *
>
> Beyond that then, the curriculum is what the local school board says it is.

Pet. App. 24a, 25a (quoting Baumgartner Dep. at 6, 8). Acceptance of this definition renders the Act a dead letter. If the "curriculum" includes anything the school officials deem to be part of their "mission," then the Equal Access

Act is only precatory language. School officials will be free to discriminate against any speech they happen to disfavor.

The definition accepted by the courts below disregards the language, legislative history, and purposes of the Equal Access Act. The Act defines the term "meeting" as an activity of a student group that is not "*directly related* to the school *curriculum*." 20 U.S.C. § 4073(3) (emphasis added). It does not define the term as any activity tangentially related to the school's "mission." Senator Hatfield, the principal Senate sponsor, described "curriculum related" groups as those that are "really a kind of extension of the classroom," giving as examples a "French club or a Spanish club where they get together to talk nothing but that language." 130 Cong. Rec. S8342 (daily ed. June 27, 1984). Indeed, as the district court noted (Pet. App. 25a), congressional drafters originally used the term "nonschool-sponsored," but changed the term to "noncurriculum related" precisely out of the fear that school officials could frustrate the intent of the Act by deeming all student clubs to be sponsored by the school except those it would discriminate against. According to the sponsors of the legislation, the definition of "noncurriculum related" should be "fairly broad." 130 Cong. Rec. at S8342 (statements of Senators Gorton and Hatfield). By contrast, the lower courts' approach renders this category a null set. The court's definition is so subjective that compliance with the Act becomes effectively voluntary.[5]

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[5] In rejecting the Ninth Circuit's legal position, the Eighth Circuit observed:

> Allowing such a broad interpretation of "curriculum-related" would make the EAA meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club

Moreover, the court of appeals erroneously held that "the district *must* exclude organized religious speech because use of public school facilities for religious purposes violates the Establishment Clause." Pet. App. 13a (emphasis in original). This holding demonstrates a profound misunderstanding of the nature of constitutional protections for freedom of religion. Under this Court's precedents—most notably, *Widmar v. Vincent*—the government does not violate the Establishment Clause when it extends access to its facilities to a broad range of activities, among them religious speech. The record in this case, the congressional findings based on similar circumstances elsewhere, and this Court's decision in *Widmar* all demonstrate that providing equal access for religious and nonreligious extracurricular groups creates neither the appearance nor the reality of government control or endorsement. As the Eighth Circuit held in *Board of Education of Westside Community Schools v. Mergens*:

> "The language of the EAA closely tracks the holding of the Court in *Widmar*. In fact, the only difference between the EAA and *Widmar* is the EAA's express extension of the equal access principle to public secondary school students. Any constitutional attack on the EAA must therefore be predicated on the difference between secondary school students and university students. We reject this notion because Congress considered the difference in the maturity level of secondary students and university students before passing the EAA. We accept Congress' factfinding.

867 F.2d 1076, 1080, *cert. granted*, 109 S. Ct. 3240 (1989) (No. 88-1597). The Establishment Clause exists to pre-

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on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the EAA. A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group.

Board of Education of Westside Community Schools v. Mergens, 867 F.2d 1076, 1078, *cert. granted*, 109 S. Ct. 3240 (1989) (No. 88-1597); 130 Cong. Rec. H 12271.

vent the government from initiating and endorsing religious activities; it places no constraint on the freedom of individuals to initiate and engage in religious activities, even on government property.

Although the Court in *Widmar* had no occasion to decide whether the equal access principle it enforced at the university level would apply to high school students (454 U.S. at 270 n.14), the author of the *Widmar* opinion, Justice Powell, and three other Justices subsequently concluded that it would. *Bender v. Williamsport Area School District*, 475 U.S. 534, 551-557 (1986) (dissenting opinions). Justice Powell wrote: "I do not believe—particularly in this age of massive media information—that the few years difference in age between high school and college students justifies departing from *Widmar*." *Id.* 556-557. After extensive investigation into the question, Congress reached the same conclusion when it passed the Equal Access Act. S. Rep. No. 357, 98th Cong., 2nd Sess. 34-36 (1984).

This case raises important questions of law that have frequently recurred in school districts all over the nation and divided the courts of appeals. In recent years, this Court has twice granted petitions for certiorari in substantially similar cases, and presently has under review a decision by the Eighth Circuit in direct conflict with this case. *Board of Education of Westside Community Schools v. Mergens, supra.*[6] *See also Bender*, 741 F.2d 538 (3d Cir. 1984), 475 U.S. 534 (1986) (certiorari granted on constituitonal question; judgment vacated on jurisdictional grounds). Both the Eighth Circuit in *Westside* and the Third Circuit in *Bender* concluded, on facts similar to those in this case, that the schools had established a limited open forum and were under a presumptive constitutional (in *Bender* and *Westside*) or statutory (in *West-*

[6] The Eighth Circuit specifically cited and disapproved the holding of the court of appeals in this case. 867 F.2d at 1080 n.3.

side) obligation to extend equal access to students who wish to meet for voluntary, student-initiated, and student-directed religious discussions. In another case involving student political speech, the Third Circuit held that a school district created a limited open forum under the Equal Access Act by allowing a student-initiated volleyball marathon in the boys' gymnasium.[7] On the other hand, the Third Circuit in *Bender*, along with the Second, Fifth, and Eleventh Circuits,[8] have held that to allow students to meet on school premises during noninstructional time for religious discussions would violate the Establishment Clause. These decisions have created so much uncertainty about the law that school officials in many parts of the country, including respondents, have mistakenly concluded that they are legally required to deny access to religious student groups on threat of lawsuits. Decisions like the one below have placed school officials in the difficult position of censoring student speech and creating conflict with students who are respectful, law-abiding, and studious. Moreover, as Congress noted in passing the Equal Access Act, the sheer cost of litigation caused by this legal uncertainty is a wasteful drain on

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[7] *Student Coalition for Peace v. Lower Merion School*, 776 F.2d 431 (3d Cir. 1985).

[8] *Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); *Nartowicz v. Clayton County School District*, 736 F.2d 646 (11th Cir. 1984). The *Bender* case may be distinguishable because the students sought to meet during an activity period, which was part of the school day. The precise holding in *Lubbock* is unclear. The decision could be limited to school districts with a past history of religious activity. *See* 640 F.2d 424, 426 (5th Cir. 1982) (denial of petition for rehearing *en banc*) (Reavley, J., dissenting) (dissenting judges uncertain as to scope of panel's decision). In *Nartowicz*, the decision was not on the merits, but solely a review of an order granting a preliminary injunction.

education resources. S. Rep. No. 357, 98th Cong., 2nd Sess. 21 (1984).

The parties to this case developed a full trial record, on the basis of which this Court can resolve both the statutory and constitutional issues.[9] This case would therefore serve as a valuable supplement to the *Westside* case, and assist this Court in reaching a definitive judgment on these important issues. Should this Court decide to set this case for argument with *Westside*, counsel for petitioners are willing to commit to an expedited briefing schedule so that the Court's calendar would not be seriously disrupted.

This Court has the opportunity in *Westside* and this case to develop clear legal standards for the guidance of school officials, students, and lower courts in equal access controversies. If this Court were to affirm *Westside* but deny this petition, it would perpetuate the present state of legal confusion, as students and school officials throughout the nine states of the Ninth Circuit and elsewhere would be left to the unedifying task of further hair-

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[9] At trial, petitioners submitted by stipulation in lieu of live testimony the depositions (including digests) of the faculty advisors of nine extracurricular clubs at Lindbergh High School, the principal, superintendent, and deputy superintendent for instruction, the affidavits of the petitioner students, as well as the deposition of the school district's expert on curriculum. In addition, petitioners submitted the constitutions of 11 Lindbergh student clubs, the school district's Master List of authorized student groups for the past three years, the list of active Lindbergh clubs in the student handbook, the list of extracurricular student activities for which faculty advisors receive or do not receive stipends, as well as extensive materials describing Lindbergh's extracurricular program that grants graduation honors for voluntary community service by students through religious and political organizations. Finally, the record at trial also included an extensive set of stipulated facts, including the stipulation that "one or more of said student clubs are student-initiated, significantly student-directed, and student participation therein is voluntary." Stip. at 2, ¶ 6 (Exc. 3).

splitting litigation to discover distinctions between the nearly indistinguishable facts of these two cases. On the other hand, if this Court affirms the Eighth Circuit's decision in *Westside* on the merits, it would be appropriate to grant this petition, vacate the judgment below, and remand for reconsideration in light of the *Westside* decision.

CONCLUSION

For these reasons, the Court should grant the petition for certiorari in this case and either set it for argument with *Board of Education of Westside Community Schools v. Mergens*, No. 88-1597, or, if appropriate after the decision in *Westside*, vacate the judgment below and remand for reconsideration by the court of appeals.

Respectfully submitted,

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